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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 17

ALBERT A. HOEPER,

Appellant,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY OF WISCONSIN,

Respondents.

BRIEF OF RESPONDENT TAX COMMISSION OF WISCONSIN AS TO JURISDICTION OF THE SUPREME COURT OF UNITED STATES ON APPEAL

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

JOHN W. REYNOLDS,
Attorney General of Wisconsin,

HAROLD M. WILKIE,
Special Counsel for Respondent,
Tax Commission of Wisconsin.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 714

ALBERT A. HOEPER,

Appellant,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY OF WISCONSIN,

Respondents.

BRIEF OF RESPONDENT TAX COMMISSION OF WISCONSIN AS TO JURISDICTION OF THE SUPREME COURT OF UNITED STATES ON APPEAL

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Respondent Tax Commission of Wisconsin claims that the Supreme Court of the United States should not take jurisdiction of this appeal from the Supreme Court of Wisconsin for two reasons:

I. Appellant's claim that the part of the State Income Tax Statute in question is repugnant to the Fourteenth

Amendment to the Constitution of the United States is frivolous and without substance.

II. The cases relied upon by Appellant do not sustain the alleged jurisdiction of The Supreme Court of the United States in this case.

ARGUMENT

I

APPELLANTS CLAIM THAT STATE STATUTE IS REPUGNANT TO FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS FRIVOLOUS AND WITHOUT SUBSTANCE.

The part of the Wisconsin Income Tax Statute here in question has been twice sustained by the Supreme Court of Wisconsin against the claim that it was repugnant to the Fourteenth Amendment to the Federal Constitution.

The statute was first sustained in The Income Tax Cases, (1912) 148 Wis. 456, 513; 134 N. W. 673, 691; 135 N. W. 164, which sustained the constitutionality of the Wisconsin Income Tax Law.

> "Objection is also made to the provision that the income of a wife living with her husband shall be added to the income of the husband, and the income of each child under eighteen years of age living with its parent or parents shall be added to that of the parent or parents. This is another case of classification, and it is only justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We think there clearly is such a difference, in this, that experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law, which the close relationship of husband and wife or

parent and child makes possible, if not easy. The temptation to make colorable shifts and transfers of property in order to secure double or even triple exemptions, if there were not some provision of this kind in the law, would unquestionably be very great. There is no such temptation or opportunity in the case of the single man, or the man and wife who are living separately."

This decision was followed by the Supreme Court of Wisconsin, in the present case, decided November 11, 1930, 233 N. W. 100, after the law as established in the Income Tax Cases had been acquiesced in for nearly twenty years. There is no reason to reopen the question unless the decision of this court in Schlesinger v. Wisconsin, 270 U. S. 230, compels a reconsideration of the matter. That question was carefully considered by the Supreme Court of Wisconsin in the decision in the present case. (233 N. W. at page 102)

"The contention of the appellant is that the Schlesinger Case has repudiated the basis upon which the decision in Income Tax Cases, supra, purports to rest, and requires that the latter case be overruled in so far as it establishes the validity of subdivision (2) (d), §71.05 and subdivision (4) (c), §71.09 Stats. To this we cannot agree. It may quite easily be admitted that an invalid tax may not be exacted of one person in order that a valid tax may effectively be collected from another, without progressing at all towards the solution of this case. The very question in this case is whether the tax is invalid, and this depends upon whether a classification, based on the marriage relation, is wholly arbitrary and unreasonable in connection with the imposition of an income tax. We cannot agree that it is. The marriage relation has always been a matter of great public concern. As was said in *Boehmer v. Kalk*, 155 Wis. 156, 160, 144 N. W. 182, 183, 49 L. R. A. (N. S.) 487:

'The marriage relation is one of the most important of those fundamental social facts or relations upon which both civilized society and government rest. The interest of the public in its preservation and in the fair and equitable enjoyment and control of property rights by the husband and wife respectively, to the end that the relation may be permanent and satisfactory is very great; consequently there can be no doubt of the right of the public to control and regulate both the relationship itself and the property rights of the parties to the relation by such reasonable and appropriate regulations as do not unnecessarily interfere with those rights of person and property which both state and federal constitutions were framed to protect.'

The relation has always been recognized as offering peculiar opportunities for fraud and colorable transfers for the purpose of defeating creditors. It is clear that it also offers opportunities that do not exist to the same degree in the case of single persons, for shifts and transfers of property in order to secure greater exemptions from income taxes, and to avoid the higher brackets of such a tax. The relation offers special advantages to those who are in the relation, and the concern of the government to secure and protect these advantages has contributed not only to the problems of government, but to the expenditures for which taxes are levied. Those in the relation form a well-recognised social and economic unit, deriving benefits as such unit from the combined incomes of its members and in proportion to the size of this income.

In Income Tax Cases, supra, it was recognized that the advantages enjoyed by a group over individuals might be the basis for a classification with respect to exemptions.

'A number of contentions are made with regard to the exemption features of the act, and, first, it is said under this head that the allowance of exemptions to individuals and the denial of them to partnerships is unjust discrimination. The question depends, of

course, upon whether there is any valid ground for classification. Is there such a substantial difference between the classes as to reasonably suggest or call for the propriety of different treatment? We are clearly of opinion that this question must be answered in the affirmative. A partnership ordinarily has certain distinct and well known advantages in the transaction of business over the individual, arising from the fact that it allows a combination of capital, brains, and industry, and thus makes it possible to accomplish many things which an individual in the same business cannot accomplish.' Income Tax Cases, 148 Wis. 456, 511, 134 N. W. 673, 690, 135 N. W. 164.

It is of course true that there may be some families in which the husband enjoys the benefit solely from his income, and the wife the benefit solely from hers. This, however, is not the usually contemplated result of the marriage, and the fact that the statute may seem to affect unfairly a few persons thus situated has no bearing upon the reasonableness of the classification. The question with respect to classification 'is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there is a distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them.' *State v. Evans*, 130 Wis. 381, 110 N. W. 241.' *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 218, 37 L. R. A. (N. S.) 489.

It will be noted that both sections under examination here relate to the income of the husband and wife only when living together as husband and wife, and it is at least a permissible inference that the Legislature might have had in mind the advantages with respect to the enjoyment of the income, in enacting these sections and providing for a tax based on the aggregate income."

The above, it seems to us, shows so clearly that there was at least some reasonable basis for the classification in

question that any contention that the statute violates the 14th amendment is frivolous and without substance.

It is purely a matter of state policy whether the common law rule of unity of husband and wife be preserved or if modified, to what extent it should be modified. This is purely a question of state law. Whether the present law be regarded as retaining the common law rule of unity of husband and wife for the purpose of measuring the rate of income tax or it be regarded simply as making a tax classification based on a real difference in ability to pay, it is apparent that a real substantial ground exists for the classification and therefore there is no substantial Federal question involved.

Quong Wing, v. Kirkendall, 223 U. S. 59 at 62.

Any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is enough if the classification is reasonably founded in the purpose and policy of taxation.

Heisler v. Thomas Colliery Co., 260 U. S. 245, 255.
Watson v. State Comptroller, 254 U. S. 122.
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II

CASES RELIED UPON BY APPELLANT DO NOT SUSTAIN ALLEGED JURISDICTION OF SUPREME COURT OF UNITED STATE IN THIS CASE

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, was a case where a Kentucky Corporation was taxed under a Kentucky statute upon its rolling stock permanently located in other states and employed there in its business. It presented a question of state jurisdiction over

the property taxed. There can be no question in this case but that the earned income of both husband and wife was subject to Wisconsin Income Tax.

Williams v. Bruffy, 102 U. S. 248, simply states the undisputed rule that this Court may review the decision of a state Supreme Court, where a proper federal question is involved.

Western Union Tel. Co. v. Crovo, 220 U. S. 364, presented a Virginia statute which imposed a penalty upon telegraph companies which negligently failed to transit as promptly as practicable, messages received in Virginia for transmission to other states. This was held to be valid legislation in the absence of federal legislation on the subject.

Home Savings Bank v. Des Moines, 205 U. S. 503, involved an Iowa statute that directed that a tax upon the stock of state banks should be assessed to the banks and not the stockholders. This was held to violate the immunity of national securities from state taxation, for the effect of the statute was to adopt the value of the shares as the measure of the tax, without permitting deduction from such valuation of the bonds of the United States owned by the state banks. We cannot see how any similar question is here involved.

Corliss v. Bowers, 281 U. S. 376, arose under the federal Income tax law, and held that the grantor of a revocable trust in favor of grantor's wife, could be assessed for income tax even though such income was actually paid to the wife, and the grantor lost the power to appropriate it. The case involves no state legislation. It is important as a recent expression of the policy of the Court on income tax legislation, that, "*taxation is not so much concerned with refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax*

is paid." This clearly supports the law in the present case.

Wilcutts v. Bunn, (Decided Jan. 5, 1931.) 75 L. Ed. 155; No. 5 U. S. Sup. Ct. Adv. Opinion 155, involved the question of whether the Federal Income Tax law could tax profit derived from the sale of municipal bonds. It was held that they were subject to federal legislation and taxation in the absence of any showing that any appreciable burden was thereby cast upon the state's borrowing power. The case does not involve state legislation, and we are unable to see how it relates to the question presented in this case, in even the remotest degree.

We submit that examination of the authorities relied upon by appellant, do not support the jurisdiction of the Supreme Court of the United States in this cause. We also submit that the authorities cited in the first sections of this brief on jurisdiction, clearly show that such jurisdiction does not in fact exist in this case, and that there is no substantial federal question involved.

Dated March 14, 1931.

Respectfully submitted,

JOHN W. REYNOLDS,
Attorney General of Wisconsin,

HAROLD M. WILKIE,
Special Counsel for Respondent,
Tax Commission of Wisconsin.



APPELLEE'S BRIEF

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 17

Appeal from Supreme Court of Wisconsin

ALBERT A. HOEFER,

Appellant,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY OF WISCONSIN,

Respondents.

BRIEF OF APPELLEE TAX COMMISSION OF WISCONSIN

JOHN W. REYNOLDS,
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State Tax Commission, Appellee.



OUTLINE OF BRIEF

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ARGUMENT

THE STATUTES HERE IN QUESTION ARE (IN THE PROVISIONS CHALLENGED BY APPELLANTS) BASED ON BOTH PRACTICAL AND LEGAL DISTINCTIONS WHICH RENDER IT IMPOSSIBLE TO LOGICALLY HOLD THAT THESE PROVISIONS ARE PURELY ARBITRARY AND INVOLVE A CLASSIFICATION WITHOUT ANY REASONABLE GROUND THEREFOR.

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CASE APPEALED FROM

(Hoeper v. Tax Commission, 202 Wis. 498, 233 N. W. 100)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 714

Appeal from Supreme Court of Wisconsin

ALBERT A. HOEPER,

Appellant,

vs.

TAX COMMISSION OF WISCONSIN AND MARATHON COUNTY OF WISCONSIN,

Respondents.

BRIEF OF APPELLEE TAX COMMISSION OF WISCONSIN

STATEMENT OF CASE

The statement of facts by counsel for appellant (pp. 2–4 appellant's brief) is correct. It is conceded by appellant that the judgment below in no way takes into consideration any income of the wife before she became the wife of appellant but it is claimed that the tax paid by appellant under protest was $56.14 more than he would have been obliged to pay if his wife's income after marriage had been left out of the total amount of income on which the income tax payable by him was computed. Of Mrs. Hoeper's income, only $148.91 was from dividends and interest, $2400.00 was from salary for

services in an insurance agency in which she was a partner and $1519.52 was from distribution out of partnership profits in excess of such salary. (Tr. pp. 5–6)

The contention of counsel for appellant is that in Wisconsin by other legislative enactments the marriage relation has become a mere social relationship and that the husband has no *legal* right or interest in the income of his wife. (Appellant's Brief pp. 8–11, 17) It is then contended that classification for purposes of taxation must be based on "legal rights and duties" (p. 20) alone and it is further said "Pass beyond that and no other clear limitation can be found." (p. 20) Counsel gives the illustration of collateral relatives or strangers from whom a benefit in the support of the family may be expected but to which there is no legal right. (pp. 19–20)

We believe it to be well established that the modification of the incidents of the marriage relation lies peculiarly within the power of the legislature of the state and that the particular modification here involved presents no substantial federal question. This court has deferred the consideration of this question of jurisdiction until argument on the merits and we shall argue both propositions together. The only questions are (1) Is a substantial federal question presented, and (2) If so, is the basis of the tax here in question so plainly arbitrary and without substantial reason to support it as to invalidate it under the Fourteenth Amendment.

It is claimed by appellant that the amount of his wife's separate income (though she is living with her husband) cannot be used or relied on in any way to swell the amount he is called upon to contribute by way of income taxation. It is not claimed that her income is of such character that by either Federal Constitution or law it is exempted from state taxation and that therefore to use it in measuring the tax to him would indirectly be violating a Federal law exempting certain property from taxation (as for example United States Bonds).

ARGUMENT

THE STATUTES HERE IN QUESTION ARE (IN THE PROVISIONS CHALLENGED BY APPELLANTS) BASED ON BOTH PRACTICAL AND LEGAL DISTINCTIONS WHICH RENDER IT IMPOSSIBLE TO LOGICALLY HOLD THAT THESE PROVISIONS ARE PURELY ARBITRARY AND INVOLVE A CLASSIFICATION WITHOUT ANY REASONABLE GROUND THEREFOR.

(1) *Practical considerations upon which the legislature may well have relied are sufficient to sustain the law in question.*

In respect to the above mentioned contentions of the able counsel for appellant and the illustrations of strangers and collateral relatives to which he refers (as indicating the extent to which tax legislation might be carried if encouraged by a decision sustaining the law here involved) it might well seem sufficient to quote the language of Mr. Justice Holmes in *Noble State Bank vs. Haskell*, 219 U. S. 104 (upholding state bank guaranty law compelling all banks to submit to assessment to create fund to protect depositors of all banks as against the challenge that it violated the 14th Amendment):

> "In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown easily enough, to transgress a scholastic interpretation of one or the other of the great guarantees in the Bill of Rights." (p. 110)
>
> * * *
>
> "It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency and *where we are going to draw the line.* But the last is a futile question and we will answer the others when they arise. With regard to the police power as

elsewhere in the law, lines are pricked out by a gradual approach and contact of decisions on the opposing sides." (p. 112) (Italics ours)

Undoubtedly Mr. Justice Holmes had in mind when he said "as elsewhere in the law", the situation with respect to taxation where the same rules are applied.

In *State Board of Tax Commissioners vs. Jackson*, 75 L. Ed. 670 at 674, this court, by Mr. Justice Roberts, said (upholding Indiana chain store tax):

> "The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations."

And again in the same case it is stated:

> "Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear."

In the above case the court stressed *not* any preexisting *legal* difference between large department stores and chain stores but practical differences which the legislature may have had in mind in respect to their relative earning capacity and advantages. (P. 675 of 75 L. Ed.)

Thus in the same opinion it is stated: (p. 673)

> "The record shows that the chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities. With respect to associations of individual stores for purposes of co-operative buying, exchange of ideas as to advertising, sales methods, etc., it need only be remarked that these are voluntary groups, and that series of inde-

pendent units cannot, in the nature of things, be as efficiently and successfully integrated as a chain under a single ownership and management."

The above would seem to indicate very plainly that the precise analysis of legal rights prior to and independently of this statute cannot (as claimed by appellant) be made a measure of the power of a state legislature to make distinctions in taxation. The above decision in the chain store case is much stronger than necessary to sustain our position here since here we have not only a practical distinction in respect to ability to pay and in the benefits derived from government by the family unit but also have the well established legal relationship of marriage which (though its incidents may be somewhat modified by other state legislation) is still a very definite legal relationship and one peculiarly subject to legislative control. In the chain store tax situation the members of this court divided on the question of whether there were any practical advantages in the chain store superior to those possessed by the large department store. No such room for difference of opinion exists, we think, in the present case. Those within the marriage relation and actually living together obviously form a "natural class" both from a practical and legal standpoint.

So also in the above case of *State Board of Tax Commissioners vs. Jackson*, 75 L. Ed. 670 at 674 we find it stated in the majority opinion:

> "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded on a reasonable distinction (citation) or if any state of facts reasonably can be conceived to sustain it (citations)".

The state statute here in question permits the rate of tax and average income on which the tax is to be paid by the husband to be greater (by reason of his wife's income) than he otherwise would pay *only where the husband and wife are*

living together. (See Statute quoted p. 22 Appellant's Brief). If the wife were living apart, she would have a separate exemption, be assessed separately, and so would he and the rate would be somewhat lower. In such case, they would not be living in the same family establishment and the same reason would not exist for taxing him on the basis of greater ability to pay because of each spouse having an income. Greater ability to pay is of course a justification for requiring larger contributions by way of income taxation.

As stated in *Shaffer v. Carter*, 252 U. S. 37 at 51:

> "Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may readily be proportioned to their ability to pay."

It is true that Wisconsin has modified some of the common law incidents of the status of husband and wife. It has given the wife the right to her separate earnings and property, enlarged the right to sue and given her other privileges.

Wis. Stats. Sec. 246.07, 6.015 and other sections quoted at pp. 8–10 appellant's brief.

But these changes were within the legislative power to modify the relative duties and rights of husband and wife. The legislature can make more changes. The very law here under consideration fixes a certain changed legal consequence from the relation of marriage. The husband and wife in this case were married in 1927 (Tr. 16), long after all the legislation here involved (including all the statutes quoted by appellant at pages 8–10 appellant's brief) was adopted and fully appreciating that they were governed by any laws changing wholly or partially the respective rights of the parties at common law and fixing certain obligations and duties on husband and wife. In view of this right of the state legislature to modify the duties and responsibilities in the marriage relation we are

unable to see even the presence of a federal question in this case.

Moreover, if there were technically a federal question here, we think the right of the state legislature to use the presence of the marriage relation as a ground for classification is so clear as to preclude the view that there is a "substantial" federal question here.

This view is strengthened by the fact that more than twenty years ago these provisions of this law were sustained in the Supreme Court of Wisconsin *(Income Tax Cases*, 148 Wis. 456 at pp. 513–514) and that until now such decision has remained unchallenged; the provisions have been acquiesced in in practice. Such fact would seem to be strong evidence in itself of "some substantial" ground for the classification. The Supreme Court of Wisconsin then *(Income Tax Cases*, 148 Wis. 456 at 513–514) and now (202 Wis. 493; 233 N. W. 100) has considered the marriage relation as it exists under Wisconsin law ample ground for the classification here involved. Nor did this arise out of any lack of appreciation of the proper rule for it was stated in the *Income Tax Cases*, 148 Wis. 456 at 513–514 in respect to the very provisions here involved:

> "This is another case of classification, and it is only justifiable in case there is some substantial difference which suggests the advisability of difference of treatment."

The Wisconsin court said in the instant case:

> "The relation offers special advantages to those who are in the relation, and the concern of the government to secure and protect these advantages has contributed not only to the problems of government, but to the expenditures for which taxes are levied. Those in the relation form a well recognized social and economic unit, deriving benefits as such unit from the combined incomes of its members and in proportion to the size of this income." P. 102.

This court considered the married status in the case of *Maynard v. Hill*, 125 U. S. 190, saying:

> "Marriage as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, *the duties and obligations it creates, its effect upon the property rights both present and prospective*, and the acts which may constitute grounds for its dissolution." (Italics ours)

Practical considerations affecting ability to pay and affecting the amount which the head of a family ought to contribute and can contribute by way of taxation without jeopardizing the support of his family are surely at least as much for the consideration of the legislature and the court as the more technical considerations of strictly legal rights.

Whatever may be the situation as to strangers or collateral relatives, we all know that in fact the family burdens on a husband are greatly lightened by the possession and receipt of substantial income by his wife. The family unity is a fact which has not and probably cannot be changed by legislation. The relation in fact existing between husband and wife, with its practically universal accompaniment of assistance to each from the income of the other in the performance of the common family duties and in sustaining the common family burdens would seem in itself quite sufficient to acquit a legislature, in respect to legislation such as is here involved, of a charge of having passed a law making unfair and arbitrary discriminations without any reasonable basis therefor. But in addition to this, the husband still has very substantial legal rights in Wisconsin of pecuniary value in respect to the income and property of the wife.

(2) *Under Wisconsin laws the husband still has substantial pecuniary advantages from the property and income of the wife which are not possessed by other persons.*

Appellant's counsel quotes (p. 9 appellant's brief) *Section 6.015 Wisconsin Statutes* under which it was sought to place a wife on an equality with the husband under the law except in respect to protection and privileges under the law which she enjoys for the general welfare.

In *Wait v. Pierce*, 191 Wis. 202 at 211 the court said (as to this statute):

> "We all have more or less conscious ideals and cherished concepts relating to the unity of the family and the sanctity of the family relation. We regard with disfavor the gradual disappearance of these ideals in the community at large. As a matter of fact, however, the family relation is not disturbed by the enactment of statutes conferring rights upon married women. It is only when the ideal family relation has for some reason been disrupted that rights under the statute are asserted."

The Wisconsin Statutes provide that "The father, *mother*, husband, children, *and wife* of any poor person who is blind, old, lame, impotent or decrepit so as to be unable to maintain himself, shall relieve and maintain such poor person so far as they are able", and further that the county judge on notice shall "by order require relief and maintenance from such relatives * * * if living and of sufficient ability * * * in the following order: first the husband or wife; then the father; then the children; and lastly the mother."

Sec. 49.11 Wisconsin Statutes (Italics ours).

In cases of divorce, where the custody of the children is awarded to the husband "the court may adjudge to the husband out of the separate estate of the wife, such sums for the support and education of such minor children as it shall deem just and reasonable".

Sec. 247.27 Wisconsin Statutes.

As to judicial separation, it is specifically provided that: "the court may finally divide and distribute the estate, both real and personal of the husband and so much of the estate of the wife as shall have been derived from the husband between the parties, and divest and transfer the title of any thereof accordingly, having always due regard to the legal and equitable rights of each party, the ability of the husband, *the special estate of the wife*, the character and situation of the parties and all the circumstances of the case."

Sec. 247.26 Wisconsin Statutes (Italics ours).

The above results have been held to follow after the enactment of all the statutes to which counsel refers in his brief.

Steinbach v. Steinbach, 200 Wis. 208.

Voegli v. Voegli (Wis.), 236 N. W. 123.

Kalbakken v. Kalbakken, 199 Wis. 501.

While it is true, as stated by counsel, that a wife can legally disinherit her husband in Wisconsin, certainly such is not the usual result. Both the husband and children usually derive a very substantial benefit from the possession of separate property or income by the wife.

Under Wisconsin law the husband is still entitled to maintain an action for damages for injury to or death of the wife in which the damages are measured not only by the value of her services in the household but also by other earnings which have aided in the support of the family.

Herro v. Malleable Iron Company, 181 Wis. 198, 200.

(3) ***That in exceptional cases a husband may possibly derive no benefit from the income of his wife does not invalidate this law.***

Appellee does not concede that in the actual working out of the law any appreciable hardship will be occasioned. Surely there is none in this case. As the Wisconsin Supreme Court said in this case:

> "It is of course true that there may be some families in which the husband enjoys the benefit solely from his income, and the wife the benefit solely from hers. This, however, is not the usually contemplated result of the marriage, and the fact that the statute may seem to affect unfairly a few persons thus situated has no bearing upon the reasonableness of the classification." P. 102

In *Quong Wing v. Kirkendall*, 223 U. S. 59 this court said:

> "It (the state) may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary." P. 62

This court in *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61 in commenting on the relation between price of admission and revenue says:

> "If it be so universal in the practice of the business, it would seem not unreasonable if it be adopted as the basis of governmental action." P. 69

So in the case of marriage; where the common situation is one of mutual financial benefit and interdependence, why should it not be a basis for classification? A court need not close its eyes to facts which everyone else knows.

The fact that there may be some hard cases under this or any other law is not sufficient reason for condemning it. If so, there would be few valid tax laws.

The same question comes up in connection with exemptions. If the legislature provided that a married man living with his wife who had a separate income of more than a certain amount should have no exemption or a lower exemption to be deducted in arriving at the net income subject to the rates, such provision would increase his tax as compared with that of a man whose wife had no separate income. But would anyone suggest that such a provision would be so unreasonable as to render the law invalid? The principle is the same as that involved in this case and the result would be the same in increasing the tax.

In the case of *Robertson v. Pratt*, 13 Hawaii 590 the court said:

> "It is impossible to attain absolute equality or uniformity in taxation. Approximate equality and uniformity is all that is required. The legislature may classify objects and provide different methods of estimating amounts or values. So long as it acts in good faith and on general lines and makes distinctions on some reasonable basis, the courts cannot interfere. The provisions in question seem to be in harmony with the general theory of the Act. *The Act seems to deal with units, whether corporate or private.* It treats as a unit all whether few or many, large or small, whose income or incomes on the one hand and expenses on the other hand are combined. Taxation laws must be practical. They cannot be Utopian. No two persons would agree as to just what a perfect tax should be. It is easy to raise objections, but the moment an attempt is made to obviate the objections by framing the law differently, new objections arise. If the one thousand dollar exemption were made to apply to each individual, there would doubtless be much greater inequality *in actual results* than is the case under the law as it stands, as will appear by a little reflection." (Italics ours)

At an early date, this court said in *Bells Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232 at 237:

> "We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were the proper construction, it would not only supersede all those constitutional provisions and laws of some of the states whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; *but it would render nugatory those discriminations which the best interests of society require.*" (Italics ours)

(4) *The fact that evasion of just income taxation (higher rates for higher incomes) would be easier if the incomes of husband and wife were not combined and tax assessed on this basis is a further consideration supporting this law.*

The law has recognized almost from time immemorial that the marriage relationship offers peculiar opportunities for evasion. This is shown by statutes regulating transfers between husband and wife, by decisions holding that transactions between them should be closely scrutinized, and by other similar laws and decisions. The Wisconsin Supreme Court said in this case:

> "The relation has always been recognized as offering peculiar opportunities for fraud and colorable transfers for the purpose of defeating creditors. It is clear that it also offers opportunities that do not exist to the same degree in the case of single persons, for shifts and transfers of property in order to secure greater exemptions from income taxes, and to avoid the higher brackets of such a tax." P. 102

But it is claimed that this ground for sustaining the statute here in question is removed by the decision in *Schlesinger v. Wisconsin*, 270 U. S. 228. That case involved the validity of a law providing that gifts made within six years of death should be *conclusively presumed* to be made in contemplation of death and thus to be subject to a *graduated inheritance tax*. It was found as a fact that the gifts in question were not made in contemplation of death. It was urged that the provision was necessary in order to prevent evasion of inheritance taxes. But it was held (Mr. Justice McReynolds writing the majority opinion) that this was not enough to save the validity of the law. It was pointed out in the majority opinion (pp. 239–240):

> "The court below declared that a tax on gifts inter vivos only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be "wholly arbitrary." We agree with this

view and are of opinion that such a classification would be in plain conflict with the 14th Amendment. The legislative action here challenged is no less arbitrary. Gifts inter vivos within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character."

Thus in above case, a situation was presented where the gift taxed could not as a gift *inter vivos* have been subjected at all to the graduated tax involved even if all gifts *inter vivos* were so subjected. And further all gifts *inter vivos* except those within six years of death were not taxed at all.

But in spite of those facts, there was a strong minority opinion written by Mr. Justice Holmes and in which Justice Brandeis and Mr. Justice Stone concurred in which it was said:

> "I am not prepared to say that if the legislature held that belief, it might not extend the tax to gifts made within six years of death in order to make sure that its policy of taxation should not be escaped. I think that with the states as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the necessity for resorting to them."

Compare the situation in the Schlesinger case with that here. *Here the income of the wife can unquestionably be made the subject of a graduated tax just as that of the husband.* No presumption is resorted to to make her income a partial measure of the tax. She and her husband both could be taxed at a higher rate because they each had income and they had each less burden to bear because they were husband and wife and lived in the same household. The rate is higher but no subject matter is taxed which in a similar situation is

not taxed the same way. In the Schlesinger case of *inter vivos* gifts, only gifts within six years of death were taxed. Here the rule is absolutely the same as to every husband and wife living together and as to *all* their income. In every family the same rule applies as to *all* income. We therefore think this case is easily distinguishable from the Schlesinger case. And if it were not that case would only destroy *one* of the several grounds on which this statute should be sustained.

The Wisconsin Supreme Court in the present case said:

> "It may quite easily be admitted that an invalid tax may not be exacted of one person in order that a valid tax may be effectively collected from another without progressing at all towards the solution of this case. The very question in this case is whether the tax is invalid, and this depends upon whether a classification based on the marriage relation is wholly arbitrary and unreasonable in connection with the imposition of an income tax."

(5) *The case of Poe v. Sanborn, 75 L. Ed. 27 and other cases relied on by appellant are clearly distinguishable.*

The case of *Poe v. Sanborn*, 75 L. Ed. 27 held that husband and wife (residents of the State of Washington) were separately taxable on their respective parts of income of community property under the Federal Income Tax Law. It was held the Federal Law did not require the husband to pay a tax assessed to him on the whole. The case involved only the *construction* of the Federal law—not any question of validity. The court said:

> "This case requires us to construe sections 210(a) and 211(a) of the Revenue Act of 1926 and apply them as construed to the interests of husband and wife in community property under the law of Washington. These sections levy a tax on *the net income of every individual.* The act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income." (Italics ours)

The cases of *Corliss v. Bowers*, 281 U. S. 376, *U. S. v. Robbins*, 269 U. S. 315, and *Old Colony Trust Co. v. Comm.*, 279

U. S. 716, also involved the Federal income tax law, which attempts no classification based on marriage. They can have no hearing here. The Corliss Case, however, does contain this significant statement:

> "But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." P. 377.

The case of *Lucas v. Earl*, 50 S. Ct. 241 may be dismissed from consideration with the statement that it, too, merely involves the construction of the Federal Income Tax Act, as appears from the following excerpt from the opinion:

> "But this case is not to be decided by attenuated subleties. It turns on the import and reasonable construction of the taxing act."

We are not, of course, concerned with the question of the possible validity of a Federal Law similar to the one here in question. The state legislature has ample power to modify the incidents of the marriage relation—a power not possessed by Congress. In the present case the law is not only sustainable as a law imposing a fair tax in accordance with real ability to pay and in accordance with the protection afforded by the state to the family unit and provided for in such manner as to discourage evasion, but it may also be sustained as a legislative modification of the duties of the husband by the legislature having the power so to provide.

We respectfully submit that the judgment of the Supreme Court of Wisconsin should be affirmed.

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